Salem Hospital Corporation, a/k/a The Memorial Hospital of Salem County *and* Health Professionals and Allied Employees, AFT/AFL–CIO. Case 04–CA–130032

December 2, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On February 27, 2015, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a cross-exception and supporting argument and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, to amend the remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

[1] At the close of the hearing, the Respondent subpoenaed documents identifying employees who provided Union Organizer Danna Lowrie with information about the possible closure of the inpatient obstetrics unit, as well as documents in the Union's possession generally concerning the inpatient obstetrics unit or the HealthStart program. The judge thereafter granted the Union's petition to revoke the Respondent's subpoenas, finding that the subpoenas sought evidence to determine if there was supervisory taint—an issue the judge found was not before her—and sought documents that may be privileged. The Respondent claims that the judge erred in revoking the subpoenas because, contrary to the judge's finding, the purpose of the subpoenas was to elicit evidence that its supervisors had provided information to the Union regarding the closure of the obstetrics unit, and such evidence would have shown that its supervisors provided notice to the Union about the closure or provided information responsive to the Union's requests. We find the Respondent's argument without merit.

As the judge found, by the Respondent's own explanation at the hearing, the subpoenas sought information relevant to the issue of supervisory taint. The Board previously has found that the charge nurses who purportedly tainted the election were not supervisors. See *Salem Hospital Corp.*, 357 NLRB No. 119 (2011); *Salem Hospital Corp.*, Case 04–RC–021697, 2011 WL 3344015 (August 3, 2011). As such, we find that the judge did not abuse her discretion in revoking the subpoenas. Even assuming, as the Respondent argues, that the judge misunderstood the purpose of the subpoenas, we would still find no reversible error. Similarly, any information about the possible closure provided by them to the Union would not have satisfied the Respondent's obligation to provide the Union with notice of the closure and the relevant information the Union requested. See *Merrill & Ring, Inc.*, 262 NLRB 392, 400 fn. 9 (1982), enfd. 731 F.2d 605 (9th Cir. 1984) (employee rumor insufficient to relieve the respondent of its obligation to notify the union); *Columbia College Chicago*, 360 NLRB No. 122, slip op. at 2 (2014) (employer's duty to provide relevant requested information not excused by fact that union could obtain the information elsewhere).

We also find no merit in the Respondent's contention that the judge improperly relied on the hearsay testimony of Union Organizer Lowrie's supervisor, Frederick DeLuca, that some of the nurses reported to Lowrie that the Respondent was planning to close the inpatient obstetric and HealthStart units. As an initial matter, DeLuca's testimony is not hearsay because it was not relied upon to prove the truth of the matter asserted, but rather to show the effect it had on the hearer. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993). In any event, the Respondent did not object to DeLuca's alleged hearsay testimony at the hearing and thus the testimony is admissible. See, e.g., *Alvin J. Bart and Co.*, 236 NLRB 242, 243 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979).

[2] We agree with the judge that the Respondent's argument regarding the validity of Regional Director Dennis Walsh's appointment—that Walsh was acting pursuant to an invalid appointment due to the Board's lack of quorum at the time of his appointment—lacks merit. On July 18, 2014, the Board ratified all administrative and personnel decisions made from January 4, 2012 to August 5, 2013, and it expressly authorized Regional Director Walsh's appointment. Further, on July 30, 2014, Walsh ratified all decisions made between his initial appointment and July 18, 2014. See *Pallet Companies, Inc*., 361 NLRB No. 33 (2014).

We agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to timely notify the Union and engage in bargaining with it over the effects of the Respondent's decision to close the inpatient obstetrics unit and discontinue the HealthStart program. Given the Respondent's complete failure to engage in effects bargaining, we find it unnecessary to rely on the judge's finding that the Respondent refused to delay its implementation of the changes in response to the Union's requests for bargaining. In addition, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with relevant requested information concerning the inpatient obstetrics unit and the HealthStart program.

We further agree with the judge, for the reasons stated in her decision, that a limited backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the standard remedy in effects-bargaining cases, is appropriate. See, e.g., *Comar, Inc.*, 339 NLRB 903, 903 (2003), enfd. 111 Fed. Appx. 1 (D.C. Cir. 2004); *Sea-Jet Trucking Corp.*, 327 NLRB 540, 548–549 (1999), enfd. 221 F.3d 196 (D.C. Cir. 2000); *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1040 (1990). We find no merit in the Respondent's contention that a *Transmarine* backpay remedy is punitive in nature. See *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986), and cases cited therein.

[3] Exercising our broad discretionary authority under Sec. 10(c) of the Act to fashion appropriate remedies, we shall order that the Board's notice be read aloud to the Respondent's employees by the Respondent's chief executive officer or, at the Respondent's option, by a Board agent in that officer's presence. We find that requiring the notice be read aloud is warranted by the serious and persistent nature of the Respondent's unfair labor practices, especially in light of its repetition of the same type of misconduct previously found unlawful. See *Salem Hospital Corp.*, 361 NLRB No. 61 (2014), reaffirming and incorporating by reference 358 NLRB No. 95 (2012); *Salem Hospital Corp.*, 361 NLRB No. 110 (2014), reaffirming and incorporating by reference 359 NLRB No. 82 (2013); *Salem Hospital Corp.*, 360 NLRB No. 95 (2014). The presence of a management official when a notice is read serves as a "minimal acknowledgement of the obligations that have been imposed by law" and provides employees with some "assurance that their organizational rights will be respected in the future." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (quoting *Federated Logistics & Oper-*

ORDER

The National Labor Relations Board orders that the Respondent, Salem Hospital Corporation a/k/a The Memorial Hospital of Salem County, Salem, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to timely notify the Union, Health Professionals and Allied Employees, and afford it an opportunity to bargain over the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time, and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, employed by the Respondent at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards, and supervisors as defined in the Act.

(b) Pay its former employees in the unit described above their normal wages when in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the effects of the decision to close its inpatient obstetrics unit and discontinue the HealthStart program; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the amount he or she would have earned as wages from the date the employee was terminated as a result of the Respondent closing the inpatient obstetrics unit and discontinuing the HealthStart program, to the time he or she secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages, with interest, as set forth in the remedy section of the judge's decision.

(c) Pay its reassigned employees, on a per diem basis, for any economic losses incurred as a result of the closure of the inpatient obstetrics unit and discontinuation of the HealthStart program from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the effects of the decision to close its inpatient obstetrics unit and discontinue the HealthStart program; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 days after the receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith; but in no event shall the sum paid to any of the employees exceed the losses incurred from the date the employee was reassigned as a result of the Respondent closing the inpatient obstetrics unit and discontinuing the HealthStart program until the date on which the Respondent shall have offered to bar-

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ations, 340 NLRB 255, 258 (2003), enfd. 400 F.3d 920 (D.C. Cir. 2005)), enfd. mem. 273 Fed. Appx. 32 (2d Cir. 2008). We find such assurance is warranted under the circumstances of this case. In addition, in order to inform the terminated employees of the outcome of this proceeding, we shall order the Respondent to mail a copy of the attached notice to each of them at his or her last known address.

Member Miscimarra disagrees with his colleagues that a notice-reading remedy is warranted. As the judge noted, there is not a "scintilla of evidence" that Respondent has acted in bad faith in this proceeding. Rather, Respondent's refusals to bargain with the Union spring from its desire to maintain its litigation position before the D.C. and Third Circuits, in which its petitions for review contesting the Board's certification of the Union as the unit employees' bargaining representative were pending at the time of the events at issue in this case. Under these circumstances, Member Miscimarra would not order notice reading.

[4] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and the amended remedy. We note that the judge's recommended Order directed the Respondent to provide the information the Union requested in its January 15 and May 9, 2014 letters, with the exception of "the first portion of" the May 9 request 4, but the notice attached to her decision inadvertently omitted the phrase "the first portion of." We have corrected this error in the notice. We have substituted a new notice to conform to the Order as modified and to correct that error.

gain in good faith; provided, however, that in no event shall this sum be less than the losses incurred by an affected employee for a 2-week period, with interest, as set forth in the remedy section of the judge's decision.

(d) Compensate employees entitled to backpay under the terms of this Order for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(e) Furnish to the Union in a timely manner the information it requested in the January 15 and May 9, 2014 letters, with the exception of the first portion of May 9 request 4.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Salem, New Jersey facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 2014.

(h) Within 14 days after service by the Region, duplicate and mail, at its own expense, after being signed by the Respondent's authorized representative, copies of the attached noticed marked "Appendix" to the following employees at their last known address: Michele L. Newsome, Renee J. Garrison, Betty J. Moore, Linda Carr-Sibley, Jacqueline Engle, and Jacqueline Wood.

(i) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the employees by the Respondent's chief executive officer or, at the Respondent's option, by a Board agent in the presence of that officer.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 2, 2015

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Mark Gaston Pearce, Chairman

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Philip A. Miscimarra, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to timely notify the Union, Health Professionals and Allied Employees, and afford it an opportunity to bargain over the effects of our decision to

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

close the inpatient obstetrics unit and discontinue the HealthStart program.

WE WILL NOT refuse to bargain collectively with the Union by failing or refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit concerning the effects of our decision to close the inpatient obstetrics unit and discontinue the HealthStart program and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining:

> All full-time and regular part-time, and per diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, employed by us at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

WE WILL pay former unit employees their normal wages for a period of time set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL pay reassigned unit employees for any financial losses incurred as a result of their reassignment for a period of time set forth in the Decision and Order of the National Labor Relations Board, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL furnish the Union the information it requested in the January 15 and May 9, 2014 letters, with the exception of the first portion of May 9 request 4.

SALEM HOSPITAL CORPORATION, A/K/A THE MEMORIAL HOSPITAL OF SALEM COUNTY

The Board's decision can be found at www.nlrb.gov/case/04-CA-130032 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

David Faye, Esq., for the General Counsel.
Carmen M. DiRienzo, Esq., for the Respondent.
Lisa Leshinski, Esq. (HPAE), for the Charging Party.

DECISION

STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on December 1, 2014.[1] Health Professionals and Allied Employees AFT/AFL-CIO (the Union) filed the charge on June 3, 2014, and the General Counsel issued the complaint on September 22, 2014. [2] The complaint alleges that Salem Hospital Corporation a/k/a the Memorial Hospital of Salem County (the Respondent) violated Section 8(a) (5) and (1) of the National Labor Relations Act (the Act) when it failed and refused to bargain with the Union over the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program,[3] and failed and refused to provide the Union with information it requested regarding the closure of the unit. The Respondent filed answers denying all material allegations.

On the entire record, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Salem Hospital Corporation, is a New Jersey corporation that operates an acute care hospital in Salem, New Jersey. It receives gross revenues in excess of $250,000 annually and purchases and receives goods valued in excess of $50,000 annually from points directly outside the State of New Jersey. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

I further find that the Union, Health Professionals and Allied Employees, is a labor organization within the meaning of Section 2(5) of the Act.

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[1] I kept the record open for the Respondent to serve subpoenas on the Charging Party. Thereafter, I granted the Charging Party's petition to revoke the subpoenas and closed the record on January 2, 2015.

[2] The General Counsel orally amended the complaint at the trial. No substantive changes were made.

[3] HealthStart is a Medicaid program that provides comprehensive prenatal/maternity care and preventive pediatric services for children under age 2, including counseling and appropriate referrals.

II. ALLEGED UNFAIR LABOR PRACTICES

The Parties' Collective-Bargaining History

An election was held at the hospital on September 1 and 2, 2010, which the Union won. The Respondent filed objections but those objections were dismissed (Case 04–RC–021697). That decision was upheld by the National Labor Relations Board (the Board) and, on August 3, 2011, the Board certified the Union as the exclusive bargaining representative of the Respondent's employees in a unit defined as: all full-time and regular part-time, and per diem registered nurses, including staff nurses, case managers, and charge nurses, excluding all other employees, managers, guards and supervisors as defined in the Act.

Following its certification, the Union requested that the Respondent recognize it and begin bargaining. The Respondent advised the Union that it was contesting the Board's certification decision and therefore refused to meet and bargain. (GC Exh. 2.) The Union filed an unfair labor practice charge and the General Counsel issued a complaint. On November 29, 2011, the Board granted the General Counsel's motion for summary judgment; the Board found that the Respondent had violated the Act and ordered it to meet and bargain with the Union. 357 NLRB No. 119 (2011). The Respondent has filed a petition to review that decision and the matter is pending in the U.S. Court of Appeals for the D.C. Circuit.

At the same time that it requested bargaining, the Union requested information regarding employees' wages, hours, benefits, and other terms and conditions, in order to prepare for contract negotiations. The Respondent replied that it would not provide the requested information because it was contesting the certification. Administrative Law Judge (ALJ) Robert Giannasi issued a decision on April 17, 2012, finding that the Respondent had violated the Act; that decision was adopted by the Board. 361 NLRB No. 61 (2014).[4]

In October 2011, the Union requested information regarding discipline against unit members, including termination, and requested to bargain over those actions. Again the Respondent failed to provide the information or to bargain. The Union filed an unfair labor practice charge and the General Counsel issued a complaint. The case was heard by ALJ Arthur Amchan who found that the Respondent had violated the Act. That decision was adopted by the Board. 361 NLRB No. 110 (2014).[5]

In April 2012, the Respondent did not respond to the Union's request for information or to bargain about its decision to change the dress code. ALJ Michael Rosas found the Respondent violated the Act; that decision was adopted by the Board. 360 NLRB No. 95 (2014).

Those three latter cases have been appealed to the Third Circuit Court of Appeals.

The Union's Demands to Bargain and Requests for Information

At the relevant time period, Danna Lowrie was the union organizer, responsible for organizing and servicing the bargaining unit at the hospital. She held that position from November 2013 to August 2014. Lowrie was supervised by Frederick DeLuca, then the Union's assistant director, private sector representation. Barry Schneider was the Respondent's chief operating officer from December 2013 to May 2014.

In January 2014, some of the nurses advised Lowrie that they had heard rumors that the Respondent was planning to close the inpatient obstetrics unit and the HealthStart program. They also reported that the sole physician in that unit was planning to retire and there was no intent to replace him. Therefore, DeLuca directed the Union's research unit to file an OPRA (Open Public Records Act) request with the State of New Jersey Department of Health, inquiring whether the Respondent had submitted a request to the State to close the unit. The Department of Health responded that the Respondent had asked permission to close its inpatient obstetrics unit.

On January 15, 2014, Lowrie sent Schneider a letter demanding to bargain over the effects of such closure on unit members and suggesting that the Respondent postpone taking action to close the unit until such time as a first collective-bargaining agreement was negotiated. In that letter, Lowrie also requested the following information.

> 1. The name (first, last), department, personnel records, and hire date for all RNs projected to be affected by the proposed closure.
>
> 2. A detailed plan of how MHSC will approach obstetric patients that arrive at the hospital in an emergency situation or otherwise. This includes, but is not limited to:
>
> a. What training bargaining unit members will receive in order to be prepared to treat such patients.

(GC Exh. 3(a).)

Schneider did not respond to Lowrie's letter.

In April, the Union saw a newspaper article regarding closure of the inpatient obstetrics unit, to be effective May 31.[6] Therefore, on April 9, 2014, Lowrie sent Schneider a second letter, renewing the Union's demand to bargain over the closure of the inpatient obstetrics unit and advising that a new request for information would be forthcoming. (GC Exh. 4(a).)

Schneider did not respond to that letter.

On May 9, 2014, Lowrie sent a third letter to Schneider, renewing the Union's demand to bargain over the effects of closure of the inpatient obstetrics unit. Lowrie included a copy of her April 9 letter as well as the following new information request.

> As previously stated, the Union requests that the Employer provide us with the following information by May 16, 2014.
>
> 1. A list of bargaining unit RNs who will be affected by the OB closure to include:
>
> a. Name, address, phone, date of hire, department and shift
> b. Hospital seniority date and unit seniority date
> c. Copy of each employee's personnel file
>
> 2. A list of RN vacancies in the Hospital, to include:

[4] Previously decided at 358 NLRB No. 95 (2012).

[5] Previously decided at 359 NLRB No. 82 (2013).

[6] The press release with the information contained in the newspaper article is R. Exh. 1.

a. Shift, department and any specific qualifications for each vacancy

3. A detailed plan for how OB RNs will be absorbed into other units of the Hospital, to include:

a. A list of training and/or orientation that will be given to the RNs

b. An explanation of the process the Hospital plans on using to place OB RNs into other units

4. An explanation of why the MHSC OB is being closed:

a. The date the OB unit will be closed

5. A copy of any and all correspondence that has been sent to bargaining unit RNs

6. Copies of any and all documents that reflect how the closing of the OB unit will affect existing bargaining unit RNs, to include:

a. Any and all documents that reflect how our bargaining unit RNs are to respond to OB patients

7. A detailed plan of the training and/or orientation proposed for non-OB bargaining unit members along with a timeline and target dates, to include:

a. A list of any training and/or orientation that has already been offered to bargaining unit members in preparation for this closure

(GC Exh. 5(a).)

Again, Lowrie received no response from Schneider.

Neither Schneider nor anyone else on behalf of the Respondent ever responded in any fashion to Lowrie's demands to bargain or to her requests for information. None of the requested information was ever furnished to the Union by the Respondent.[7] The parties never met to bargain about the effects of the decision to close the inpatient obstetrics unit and the HealthStart program. The inpatient obstetrics unit closed effective May 31, 2014, and HealthStart services ceased being provided by the hospital. Six obstetrics unit nurses were reassigned elsewhere in the hospital: Silvia M. Drennan, Jill M. Cottrell, Tina Kille, Esperanza Driver, Gail Kirkwood, and Maria R. Soone, and six nurses were terminated: Michele L. Newsome, Renee J. Garrison, Betty J. Moore, Linda Carr-Sibley, Jacqueline Engle, and Jacqueline Wood.

The Respondent's position is that it was under no obligation to bargain with the Union over the effects of the closure or to provide the requested information, as it continues to challenge the validity of the certification of the Union.[8]

III. DISCUSSION AND ANALYSIS

A. Did the Region 4 Regional Director Have the Authority to Issue the Complaint?

The Respondent's defense that Region 4 Regional Director Dennis Walsh had no authority to issue the complaint in this matter because he was appointed at a time when the Board lacked a quorum has no merit. The Board has ruled that Walsh's appointment was legal and that he has the authority to issue complaints on behalf of the General Counsel. *Pallet Cos., Inc.,* 361 NLRB No. 33 (2014). Further, the complaint in this case was issued on September 22, 2014, long after Walsh's appointment was ratified by a full Board on July 18, 2014.

B. Did the Respondent Violate the Act by Unilaterally Making a Change that was Material, Substantial, and Significant?

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees. It is well settled that an employer violates Section 8(a)(5) and (1) when it unilaterally makes substantial and material changes without bargaining to impasse on matters that involve mandatory subjects of bargaining, i.e., when it fails to provide prior notice and the opportunity to bargain over the changes. *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962); see *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Termination of employment and reassignment of employees are clearly such mandatory subjects.

An employer's duty to bargain with the union over mandatory subjects includes a duty to bargain about the effects on employees of a management decision that is not itself subject to the bargaining obligation. See *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 677, 679–682 (1981); *Litton Business Systems,* 286 NLRB 817, 819–821 (1987), enfd. in relevant part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), cert. denied in relevant part 498 U.S. 966 (1990), revd. in part on other grounds 501 U.S. 190 (1991); *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1368 (4th Cir. 1995), cert. granted on other grounds 516 U.S. 963 (1995), affd. 517 U.S. 392 (1996); *Good Samaritan Hospital,* 335 NLRB 901 (2001). Often, "[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [effects] without calling into question the employer's underlying decision. See *Bridon Cordage Inc.,* 329 NLRB 258 (1999). Further, the employer has a duty to give preimplementation notice to the union to allow for meaningful effects bargaining. *Allison Corp.*, 330 NLRB 1363, 1366 (2000). It is well settled that Section 8(a)(5) requires effects bargaining to be conducted "in a meaningful manner and at a meaningful time. . . ." *First National Maintenance Corp. v. NLRB*, 452 U.S. at681–682. Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a fait accompli. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

The Respondent argues that it had no obligation to engage in effects bargaining because the bargaining unit was improperly certified. However, that issue has already been decided by the Board and is not before me. The Respondent contested the election results and lost before the Board; the Union was certified and the unit determined to be appropriate. Although the Respondent is appealing the Board's Decision and Order to recognize and bargain with the Union, the obligation to bargain

[7] The Respondent contends that it was an error for me to revoke its subpoenas, wherein it sought to learn the names of the nurses who had advised Lowrie of the planned closure and provided her with information about the closure. The Respondent's theory seems to be that if some of the requested information was provided by one of the charge nurses who are bargaining unit members, but whom it contends are supervisors, then it would have satisfied its obligation.

[8] The Respondent contends that the bargaining unit includes supervisors and that those supervisors tainted the election process.

about subsequent matters nonetheless exists. *Quaker Tool & Die, Inc.,* 169 NLRB 1148 (1968). Where an employer's objections to the election have been rejected, its bargaining obligation commences as of the date of the election. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974). As noted above in the section outlining the parties' collective-bargaining history, the Respondent has, in four prior cases, been ordered by the Board to bargain with the Union.

I find that Respondent had the right to make the management decision to close the inpatient obstetrics unit and discontinue administering the HealthStart program. However, the effects of that decision are material, substantial, and significant. Twelve nurses were affected: six were terminated, six others were reassigned. These are mandatory subjects of bargaining, and the Respondent had an obligation to bargain with the Union over those effects. The Respondent did not notify the Union of the change before implementation, and then refused to bargain about the effects of the change or to delay its implementation when the Union made those requests. Therefore, I find that the Respondent made a unilateral change that is material, substantial, and significant.

I conclude that the Respondent's conduct in failing and refusing to bargain with the Union over the effects of the closure of the inpatient obstetrics unit and HealthStart program violated Section 8(a)(5) and (1) of the Act.

C. Did the Respondent Violate the Act by Failing to Provide the Union with Requested Information?

It is likewise a violation of Section 8(a)(5) when an employer fails or refuses to provide information requested by the union that is necessary for the effective performance of its duties. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); see *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 153-154 (1956); *Honda of Hayward*, 314 NLRB 443, 449 (1994). Information pertaining to the terms and conditions of unit members is presumptively relevant. *NLRB v. Rockwell-Standard Corp.,* 410 F.2d 953 (6th Cir. 1969). The Union is entitled to the requested information unless the employer presents sufficient evidence to rebut the presumption of relevance. *Honda,* supra at 449.

The Union sent two requests for information to Schneider, on January 15 and May 9, 2014. Neither Schneider nor any other official responded on behalf of the Respondent to the information requests.[9] The Respondent does not challenge the relevance of the information requested in either the January 15 or May 9, 2014 letter.

Request 5 in the May 9 letter is vague. However, since the remaining requests pertain to the closure of the inpatient obstetrics unit, the Respondent may reasonably have presumed that it referenced communications regarding the unit closure, as was the Union's intent. (Tr. 29.) That information is relevant.

However, the first portion of May 9 request 4, asking why the unit is being closed, is not presumptively relevant. It was not necessary for the Union to know the reason for the closure, as the decision was management's prerogative. The Respondent was not obligated to negotiate with the Union about the decision to close. DeLuca testified that that information was requested in order for the Union to assist with the closure, or to develop a proposal to prevent the closure, or to prepare possible alternatives to the closure, to lessen the impact on the community. While those motives may be laudable, the Union was not entitled to that information.

The remaining requests in both the January 15 and May 9, 2014 letters are related to the terms and conditions of the bargaining unit members' employment and are clearly relevant to the Union's proper performance of its duties.

Thus, I find that the Union's information requests, with the exception of the first portion of May 9 request 4 seeking the reasons for the unit closure, meet the Board's standards for relevance and the information should have been provided.

I find that the Respondent's failure and refusal to provide the information requested by the Union, with the exception of the first portion of May 9 request 4 regarding the reasons for the unit closure, is a violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Salem Hospital Corporation, a/k/a the Memorial Hospital of Salem County, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a healthcare institution within the meaning of Section 2(14) of the Act.

2. Health Professionals and Allied Employees, AFT/AFL–CIO (HPAE) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to bargain collectively with the Union over the effects of its decision to close the hospital's inpatient obstetrics unit and the HealthStart program, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to bargain collectively with the Union by failing and refusing to furnish the Union with the information requested in its January 15 and May 9, 2014 letters, with the exception of the first portion of May 9 request 4, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent did not commit an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to furnish information requested by the Union in the first portion of May 9 request 4.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Make-whole relief is not appropriate in effects bargaining cases. See *Fast Food Merchandisers,* 291 NLRB 897, 899–902 (1988). The standard remedy in effects bargaining cases is a limited make-whole *Transmarine* remedy, as clarified in *Melody Toyota*. *Transmarine Navigation Corp.,* 170 NLRB 389 (1968); *Melody Toyota*, 325 NLRB 846 (1998); *Rochester Gas*

[9] Again, the Respondent asserts that some of this information may have been provided to the Union by individuals in the bargaining unit that it contends are supervisors, but it was precluded from determining the source of the information since I revoked the Respondent's subpoenas.

& Electric Corp., 355 NLRB 507, 508 (2010). A *Transmarine* remedy requires an employer to bargain over the effects of its decision and to provide employees with limited backpay from 5 days after the date of the decision until the occurrence of one of four specified conditions. See *Transmarine*, supra at 390.

The purpose of accompanying the order to bargain with a limited backpay remedy is two-fold: it is "designed both to make whole the employees for losses suffered as a result of the violation and to recreate, in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." Ibid. Making employees whole is the lesser consideration of the two. "Secondly, and more importantly, the *Transmarine* and other similar 8(a)(5) remedies are designed to restore at least some economic inducement for an employer to bargain as the law requires." *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986). This recognizes that, in these situations, the employees represented by the union have already been affected, and the urgency of the situation triggering the bargaining obligation has passed.

Here, the Respondent violated its obligation to provide the Union with an opportunity to engage in timely bargaining about the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program. Twelve nurses were affected; six were terminated and another six were reassigned. Michele L. Newsome, Renee J. Garrison, Betty J. Moore, Linda Carr-Sibley, Jacqueline Engle, and Jacqueline Wood lost their jobs altogether. It is entirely possible that there were financial losses associated with the reassignments of Silvia M. Drennan, Jill M. Cottrell, Tina Kille, Esperanza Driver, Gail Kirkwood, and Maria R. Soone, such as loss of pay due to decreased hours, for which they should be compensated. The Respondent's unfair labor practice thus deprived the Union of "an opportunity to bargain . . . at a time . . . when such bargaining would have been meaningful in easing the hardship on employees" whose income was being cut. *Transmarine*, supra at 389. Had the Respondent engaged in timely effects bargaining, the Union may have been able to secure additional benefits for affected employees. See *Live Oak Skilled Care & Manor,* 300 NLRB 1040, 1042 (1990) ("[I]t is reasonable to require that 'the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequences thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place.'"). Further, in *Transmarine*, the Board recognized that, in these circumstances, merely ordering the Respondent to engage in effects bargaining would be a pro forma remedy. Because the Respondent implemented the decision to close the inpatient obstetrics unit and discontinue the HealthStart program, and thus relieved whatever pressures motivated it to do so, "meaningful bargaining cannot be assured without restoring some measure of bargaining power to the Union in relation to the issue." *Rochester Gas*, supra at 508.

Therefore, I will order that the Respondent bargain collectively and in good faith with the Union, on request, over the effects on bargaining unit employees of its decision to close its inpatient obstetrics unit and the HealthStart program.

Further, I will order a limited backpay remedy designed to make affected bargaining unit members whole for losses they suffered as a result of the Respondent's failure to bargain over the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program. Specifically, for each affected bargaining unit member, Respondent shall pay backpay at the rate of their normal wages from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union about the effects of the closure of the inpatient obstetrics unit and discontinuance of the HealthStart program; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. However, in no event shall this sum be less than the affected employees would have earned for a 2-week period at the rate of their normal wages. See *Smurfit-Stone Contractor Enterprises*, 357 NLRB No. 144, slip op. at 5–6 (2011) (citing *Transmarine Navigation Corp.*, supra).

Backpay shall be based on the earnings that the affected employees would normally have received during the applicable period, and shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate the affected employees for any adverse tax consequences of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Additionally, I will order the Respondent to furnish the Union with the information requested in its January 15 and May 9, 2014 letters, with the exception of the first portion of May 9 request 4 as to the reasons for the unit closure.

The Union's request that I order the Respondent to pay attorneys fees is denied. This litigation is not frivolous, nor is there a scintilla of evidence of bad faith. Neither failure to present witnesses nor a request for subpoenas at the conclusion of the General Counsel's case is indicative of such.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Salem Hospital Corporation, a/k/a the Memorial Hospital of Salem County, Salem, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to bargain with Health Professionals and Allied Employees (the Union) regarding the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees:

> All full-time, regular part-time and per diem Registered Nurses including Staff Nurses, Case Managers, and Charge Nurses, employed by us at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union over the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program.

(b) Make whole its employees for any losses they may have suffered as a consequence of the Respondent's refusal to bargain over the effects of its decision to close the inpatient obstetrics unit and discontinue the HealthStart program, as set forth in the remedy section of this decision.

(c) Furnish to the Union in a timely manner the information requested in the January 15 and May 9, 2014 letters, with the exception of the first portion of May 9 request 4.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Salem, New Jersey facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 15, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 27, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the Union, Health Professionals and Allied Employees (HPAE), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our employees in the following bargaining unit:

> All full-time, regular part-time and per diem Registered Nurses including Staff Nurses, Case Managers, and Charge Nurses, employed by us at the Memorial Hospital of Salem County located at Woodstown Road, Salem, New Jersey, excluding all other employees, managers, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to bargain collectively with the Union as the collective-bargaining representative of our employees in the bargaining unit over the effects of our decision to close the inpatient obstetrics unit and the HealthStart program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union over the effects of our decision to close the inpatient obstetrics unit and the HealthStart program.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL furnish the Union the information requested in its January 15 and May 9, 2014 letters, with the exception of May 9 request 4.

WE WILL make affected bargaining unit employees whole as set forth in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate affected bargaining unit employees for any adverse tax consequences of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

SALEM HOSPITAL CORPORATION, A/K/A THE MEMORIAL HOSPITAL OF SALEM COUNTY